Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

GARY L. LEKVOLD,

Petitioner,

v.

WESTINGHOUSE HANFORD COMPANY, a Delaware Corporation; WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania Corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. ARE A PRIOR HISTORY OF FAILED WHISTLEBLOWER LEGISLATION, AND THE SUBSEQUENT PASSAGE OF THAT "ALTERNATIVE REMEDY" LEGISLATION AFTER FILING OF A *BIVENS* ACTION, SUFFICIENT TO DEMONSTRATE THAT CONGRESS DID NOT INADVERTENTLY DENY A COMPREHENSIVE REMEDY TO WHISTLEBLOWERS AT DEPARTMENT OF ENERGY NUCLEAR FACILITIES?

II. ARE NON-CONGRESSIONALLY CREATED ADMINISTRATIVE REMEDIES WHICH ARE NOT PART OF A COMPREHENSIVE REMEDIAL SCHEME SUFFICIENT TO CONSTITUTE A "SPECIAL FACTOR" FOR NOT ALLOWING A *BIVENS* REMEDY?

III. IS THE SEPARATION OF POWERS DOCTRINE VIOLATED BY ALLOWING A NON-CONGRESSIONALLY CREATED ADMINISTRATIVE REMEDY OF AN EXECUTIVE DEPARTMENT TO PRECLUDE A *BIVENS* REMEDY?

PARTIES TO THE PROCEEDINGS BELOW

The names of all parties to the proceedings, and their parent and subsidiary corporations, appear in the caption of the case.

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REPORTS AND OPINIONS BY OTHER COURTS AND AGENCIES

The United States District Court for the Eastern District of Washington entered an opinion and order dated February 25, 1992, which is set forth in the appendix.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed is the opinion of the United States Court of Appeals for the Ninth Circuit dated May 14, 1994. This Court has jurisdiction to review the opinion by writ of certiorari pursuant to 28 USC section 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution:

Amendment I. Congress shall make no law * * * abridging the freedom of speech, or * * * to petition the Government for a redress of grievances.

Amendment V. No person shall be * * * deprived of life, liberty, or property without due process of law * * * .

Energy Reorganization Act of 1974, as amended 1992:

42 USC section 5851. Employee Protection

(a) Discrimination against employee. (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his

compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee) –

(A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 USC 2201 et seq.);

(B) refused to engage in any practice made unlawful by this Act or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

* * *

(2) For purposes of this section, the term "employer" includes – * * * (D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170d. of the Atomic Energy Act of 1954 * * * .

(h) This section may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee.

* * *

Atomic Energy Act of 1954:

42 USC section 2201. General provisions

In the performance of its functions the Commission [Department of Energy] is authorized to –

* * *

(i) Regulations or orders. prescribe such regulations or orders as it may deem necessary * * * (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property; * * *

Inspector General Act of 1978:

5 USCS Appx. section 7(a) provides:

§ 7. Complaints by employees; disclosure of Identity; reprisals

(a) The Inspector General may receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.

Regulations and Orders of Department of Energy:

DOE Order 5483.1A Occupational Safety and Health Program for DOE Contractor Employees at Government-Owned Contractor-Operated Facilities

1. Purpose. To establish requirements and procedures to assure that occupational safety and health standards prescribed pursuant to the Atomic Energy Act of 1951, as amended, the Energy Reorganization Act of 1974, and the Department of Energy Act of 1977, provide occupational safety and health protection for Department of Energy (DOE) contractor employees * * * which is consistent with the protection afforded private industry

employees by the occupational safety and health standards promulgated under the Occupational Safety and Health Act of 1970 (OSHA), Public Law 91-596.

* * *

7. Responsibilities and Authorities.

* * *

d. (11) Require contractors to: * * * (b) Establish and implement programs and procedures in support of this Order which assure that: * * * 9. Contractor employees who exercise their rights under this Order are not discriminated against, as required by Chapter III

* * *

Chapter III. Nondiscrimination, Injury and Illness Information, and Accident Prevention

1. Nondiscrimination.

a. No contractor shall discharge or in any manner demote, reduce in pay, coerce, restrain, threaten, or take any other negative actions against any contractor employee as a result of the employee's filing of a complaint, or in any other fashion, exercising on behalf of himself or herself or others any right set forth in this Order.

b. Any employee who believes he or she has been discharged or in any other manner discriminated against, in violation of this Order, may file a complaint with the cognizant CO [contracting officer] or CO representative within 30 days after the alleged discrimination, setting forth the nature of the alleged discrimination. The

CO or CO representative * * * shall investigate the complaint, and if it is found that such discrimination has occurred, the field organization shall assure that appropriate measures are taken by the contractor, including rehiring or reinstatement of the employee, restoration of lost seniority, and back pay. * * *

CONCISE STATEMENT OF MATERIAL FACTS

Petitioner Gary Lekvold was employed by respondent Westinghouse Hanford Corporation (hereafter "WHC") as a senior security engineer assigned to the Security Application Center of the Safeguards and Security Function at the Hanford Nuclear Reservation in Hanford, Washington. The Reservation is owned by the United States Department of Energy, and is the site for production and storage of nuclear materials for defense and military uses. WHC is the prime contractor for operation of the programs conducted on the Reservation. Mr. Lekvold was responsible for various security functions regarding protection of nuclear materials.

In April 1988, Mr. Lekvold began dissenting from some of his supervisors' conclusions regarding the security of nuclear materials storage. Specifically, he reported that WHC was failing "to take the measures reasonably necessary to protect the public from the consequences of theft or other unauthorized loss of nuclear materials." (Complaint, para. 9). In March 1989, he was removed from the worksite, although his employment status continued. During the interim period, he suffered harrassment and retaliation by WHC for having communicated

his security concerns to officials of the Department of Energy and Members of Congress. This retaliation included unauthorized surveillance of him, demanding he see a psychiatrist, having an unscheduled security clearance "reinvestigation" done on him, and removing him from work with armed guards.

Prior to his commencement of this action, Mr. Lekvold was unaware of and did not pursue any administrative remedies within the jurisdiction of any governmental agency to redress the retaliation. Prior to his removal from the worksite, he participated in an informal "employee concerns" program administered by WHC, a basic corporate grievance procedure designed to resolve employer-employee conflict and dissatisfaction. Mr. Lekvold was not a member of any labor organization, nor covered by any collective bargaining agreement.

At the time of his removal from the worksite, WHC confiscated some of Mr. Lekvold's personal property kept in his office. Contrary to its written disciplinary policies, neither before nor after his removal from the worksite did WHC provide him with any notice or opportunity to be heard. The stated reasons for Mr. Lekvold's removal from the worksite concerned attendance and timecard procedures. After removal from the worksite, Mr. Lekvold's security access authorization was suspended, and his security clearance was later revoked by the Department of Energy.

BASIS OF JURISDICTION IN DISTRICT COURT

Jurisdiction over Mr. Lekvold's speech and due process constitutional claims in the U.S. District Court was granted by 28 USC section 1331. These are federal questions under the First and Fifth Amendments.

ARGUMENT FOR ALLOWANCE OF THE WRIT

Summary of Grounds for Review: There are two primary grounds upon which this petition is based. First, the Ninth Circuit's decision, which is based on the companion case *Bricker v. Rockwell Intern. Corp.*, 22 F.3d 871 (9th Cir. 1994), *cert. pending* No. 94-120, is one upon an important federal question which has been decided in a way which conflicts with the applicable decisions of this Court regarding actions under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 US 388 (1971); and regarding more broadly the rules of statutory construction. Secondly, the Ninth Circuit's decision is in conflict with one of the Eighth Circuit regarding the disallowance of a *Bivens* action based upon a non-Congressionally created administrative remedy, and regarding the implications of this upon separation of powers doctrine. *Krueger v. Lyng*, 927 F.2d 1050 (8th Cir. 1991).

Statutory Construction and *Bivens* Actions: The Ninth Circuit erred in denying Lekvold a *Bivens* remedy on the grounds that the 1992 Amendments of the Energy Reorganization Act evidenced a Congressional intent that DOE contractor employees be limited to statutory remedies. The 1992 remedy is neither "equally effective", nor a "special factor". Prior to filing of this action, the

Energy Reorganization Act of 1974 (ERA), 42 USC section 5851, provided remedies only for employees of contractors of the Nuclear Regulatory Commission, but not for those of the Department of Energy (DOE). Subsequent to filing, however, the Congress amended the ERA to cover DOE contractor employees as well.[1] Congress did this in express recognition that "accounts of whistleblower harassment at * * * DOE nuclear facilities (e.g., Hanford, Oak Ridge, Rocky Flats) suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry." (*Bricker* amended opinion

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[1] There is nothing in the record below whatsoever which establishes that Lekvold could have addressed any, much less all, of his claims under the ERA, DOE order, etc., even were they to apply to him. Whistleblower statutes protect not classes (such as "DOE contractor employees"), but "activity" defined by those statutes, i.e., whistleblowing. However, only whistleblowing within a confined subject matter is protected. The ERA, 42 USC sec. 5851 (a)(1)(A) and (B) cover protected activity only so far as it involves blowing the whistle on "an alleged *violation* of this chapter or the Atomic Energy Act of 1954" and/or regarding "any practice made *unlawful*" thereunder. For example, an NRC (or now DOE) contractor employee who is a secretary blowing the whistle on theft of typewriters is a "whistleblower", and may have a remedy under some statute, but *not* under the ERA, since the ERA regulates only certain aspects of nuclear power and fuels, not theft of office equipment. Perhaps both of the lower courts found this principle to apply given that *neither court even acknowledged* WHC's argument that Mr. Lekvold had a remedy under a hazardous waste statute, 42 USC section 9610, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). CERCLA establishes whistleblower jurisdiction for reporting environmental *releases* of hazardous material, and WHC argued that Lekvold's concerns over *theft* of radioactive waste could be cognizable under CERCLA.

at 876). In so amending the ERA, Congress specifically provided:

> This section may not be construed to expand, diminish, or otherwise affect *any right* otherwise available to an employee under *Federal* or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee.

42 USC sec. 5851(h), October 24, 1992 (emphasis added).

Despite this provision, the Bricker decision held, in *sua sponte* fashion,[2] that a *subsequently* enacted statutory remedy for Lekv ›ld's class of DOE-contractor employees evidences *past* Congressional intent that the class *previously* had no remedy under *Bivens*. The panel in the present case was bound to follow *Bricker*. *Lekvold* opinion at App. 4. If allowed to stand, these decisions will have far reaching effects on the availability of *Bivens* remedies in virtually any judicial context.

Under *Bivens*, a remedy may be implied by the courts for constitutional violations where (1) Congress has not provided an "equally effective alternative remedy"; or (2) where "special factors" are present. The "special factor" at issue here is whether there are indications that Congressional failure to legislate an equally effective alternative remedy was "not inadvertent". Never before has the Supreme Court or any Court of Appeals held that the

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[2] Because the Energy Reorganization Act amendments of 1992, 42 USC sec. 5851, came subsequent to the briefing of Bricker, no party's brief addressed the effect of such subsequent legislation on a pending *Bivens* claim. Nor did any party assert at oral argument the rationale adopted by the panel decision.

subsequent enactment of a remedy could retroactively evidence a Congressional intent that the affected class *previously* never should have had a *Bivens* or other remedy.[3]

The panel in this case, following *Bricker*, did not rule on the effects of *failed* ERA amendments *preceding* the *Bivens* action, but upon those which *passed subsequent* to it. The *Bricker* decision states:

> We need not attempt to discern Congress's intent in 1978 when it passed section 210 of the Energy Reorganization Act because we conclude that Congress's *subsequent* decision regarding remedies for whistleblowers at DOE nuclear facilities undermine the Brickers' argument. * * * It is true that we must be reluctant to draw conclusions concerning congressional intent from the mere failure of bills to pass. Cf. *Balelo v. Baldridge*, 724 F2d 753, 762-63 (9th Cir.) * * * . Nevertheless, the various attempts at legislation *may* suggest that Congress's inaction, whatever its reason, was not wholly inadvertent. Moreover, in 1992, Congress enacted amendments to the Energy Reorganization Act of 1974 that provide whistleblower protection for employees at DOE nuclear facilities, including a provision that allows recovery of compensatory damages – precisely the remedy that the Brickers seek in this action. * * *

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[3] The Supreme Court decisions to date had applied the Congressional inadvertence analysis only to cases where Congress have *passed*, not failed, "comprehensive" statutory schemes for addressing, or excluding, the wrongs complained of in the *Bivens* action. *Schweiker v. Chilicky*, 887 US 412 (1988) and *Bush v. Lucas*, 462 US 367 (1983). Moreover, these statutory remedies were enacted *before, not after*, the *Bivens* actions were filed.

> Through these amendments, which came too late for the Brickers, Congress has provided an elaborate and comprehensive remedial scheme. * * *

Bricker at 875 (emphasis added).[4]

Having provided this legislative context, the *Bricker* panel went on to emphatically hold, *without any citation of relevant precedent*, that the *subsequent* amendments of the ERA, not the prior failed bills, were fatal to the *Bivens* claims:

> These amendments, however, provide only prospective relief; they apply to claims filed on or after October 24, 1992, the date of enactment. [Citations omitted]. The fact that the amendments were given only prospective effect suggest that Congress did not inadvertently fail to provide relief to persons, such as the Brickers, who filed claims before October 24, 1992. * * *
>
> * * *
>
> We cannot create a *Bivens* remedy if there are "indications that congressional inaction has not been inadvertent" *Schweiker*, 487 US at 423; see also *McCarthy v. Madigan*, 112 S Ct 1081, 1090 (1992) * * * . Because we cannot characterize as inadvertent Congress's decision not to include within its remedial scheme persons who filed claims before October 24, 1992, we are

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[4] The term "may" is emphasized to show that the Ninth Circuit considered, but did not rule upon the effects of the failed legislation. Instead, the panel chose to base its decision on the effects of the subsequent amendments.

> precluded from implying a *Bivens* remedy for the Brickers' claims.

Bricker at 876.

There are two major problems with this holding. First, this decision, as stated, is simply without precedent. If it is to be the law, then it must be recognized as creating an entirely new rule of statutory construction. The Supreme Court in *Pension Ben. Guaranty Corp. v. LTV Corp.*, 110 S.Ct. 2668, 2678 (1990), stated:

> [In construing a statute], subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress and is a particularly dangerous ground on which to rest an interpretation of a prior statute when the subsequent history concerns a proposal that does not become law; congressional inaction lacks persuasive significance, because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.

The ramifications for such an unprecedented new approach are appropriate for Supreme Court review.

Non-Congressionally Created Administrative Remedies:

The Ninth Circuit erred in denying Lekvold a *Bivens* remedy on the grounds that a combination of administrative remedies and "avenues for processing his concerns"

were available to him.[5] These could not alone or in sum constitute either an "equally effective alternative remedy", nor "special factor counselling hesitation". The court below gave considerable weight to two administrative procedures potentially available to Lekvold, both vaguely based on sentence-or-two enabling legislation. (Lekvold opinion at App. 6). The court gave no indication of how these could be used to address community-wide environmental concerns, or the types of retaliation involved here. Both of the lower courts acknowledged that these sundry administrative and statutory provisions fall short of what Supreme Court precedents seem to literally require, but both courts accepted them as enough to kill a *Bivens* action anyway:

> The district court concluded that "[although] these remedies, either alone or in combination, do not constitute a comprehensive statutory scheme, they are in fact a remedial mechanism designed to provide relief in circumstances that exist in the instant case[.]"

Bricker at 877. *See also* district court order in Lekvold at App. 17-18.

The first "avenue for processing his concerns" (i.e. alternative remedy) cited by the Ninth Circuit is DOE order 5438.1A, which by its owns terms is limited to occupational safety and health concerns. (*Lekvold* opinion at App. 6). Additionally, except for the general language

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[5] Lekvold opinion at App. 6, emphasis added. With this language the Ninth Circuit has discounted even further the "alternative remedies" special factor. Now, mere "avenues for processing concerns" are enough to defeat a *Bivens* remedy.

of 42 USC section 2201(i)(3) giving the DOE power to "protect health and to minimize danger to life or property", this DOE order has been attributed to no Congressional action.

The second "avenue" cited in the *Lekvold* opinion is the Inspector General Act of 1978, 5 USCS Appx. section 7. (*Lekvold* opinion at App. 6). This statute is nothing more than an authorization to the President to create an office of inspector general in each of the federal agencies listed in section 2(1). Beside the fact that neither the Atomic Energy Commission nor the Department of Energy are so listed, and that section 7 applies only to "employees" of the federal government and not contractor employees, the Act provides no "remedy" at all. Section 7 simply allows the inspector general of the agency to "investigate" any complaints or information provided as to violations of federal laws and regulations. No remedial provisions are included in the Act. To allow a general statute such as this to constitute a "special factor" is no different than according the same status to a citizen's right to call the FBI.

This Court's decision in *McCarty v. Madigan*, 112 S. Ct. 1081 (1992) addressed the issue of whether the existence of an "administratively" created remedy may constitute a "special factor" under *Bivens* analysis. In *McCarthy*, the Bureau of Prisons argued that the existence of a grievance procedure formally adopted and published in the Code of Federal Regulations, and implemented pursuant to a general grant of authority by Congress, was dispositive of a prisoner's *Bivens* suit. The Bureau did *not* argue that the grievance procedure completely eliminated

Bivens relief.[6] Instead, the government asserted a much more timid position that under the *Chilicky* analysis, the grievance procedure should at least modify *Carlson* to provide for an administrative exhaustion requirement. The Supreme Court held that a non-congressionally adopted grievance procedure could not even have that effect. The Court stated at 117 L Ed 2d 303-04:

> [R]espondents appear to confuse the presence of *special* factors with *any* factors counseling hesitation. * * * [Court's emphasis].
>
> Interpreting the "special factors" exception in *Schweiker* * * * and in *Bush* * * * [citations omitted], the Court found the *Bivens* remedy displaced because Congress had legislated an elaborate and comprehensive remedial scheme. * * * Here Congress has enacted nothing.

As to the general grant of rulemaking authority to the Bureau, the Court rejected that this could suffice as the required Congressional involvement. The Court stated at 117 L Ed 2d 302:

> We think respondents confuse what Congress could be claimed to allow by implication with what Congress affirmatively has requested or required. By delegating authority, in the most general terms, to the Bureau to administer the federal prison system, Congress cannot be said

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[6] Prisoner actions under *Bivens* were approved in *Carlson v. Green*, 446 US 14 (1980), eight years before the restrictive "Congressional inadvertence" analysis adopted in *Schweiker v. Chilicky*, supra. It is significant that the Attorney General did not argue that the grievance procedure should be used as a special factor to overrule *Carlson*.

> to have spoken to the particular issue whether prisoners in the custody of the Bureau should have direct access to the federal courts.

Despite this language which clearly questions considering non-Congressionally created remedies as a "special factor", the Ninth Circuit discounts it as merely "some language that can be read as favorable to the [petitioner]". *Bricker* at 878.

The magnitude of Congressional involvement is at the core and principle of special factors analysis. In *Chilicky*, the court described Congressional involvement and the statutory scheme as follows:

> [An] "elaborate remedial scheme devised by Congress", [487 US at 414;] * * * [an] "administrative structure and procedure * * * of a size and extent difficult to comprehend", [id at 424]; * * * [as providing] "judicial review, including review of constitutional claims", [id]; * * * [as] "considerably more elaborate than the civil service system considered in Bush", [id at 425]; * * * [and as representing] "Congressional attention [that has] * * * been frequent and intense", [id.].

The *Bush* Court described Congressional involvement and the statutory scheme as follows:

> "[A]n elaborate, comprehensive scheme", 462 US at 385; * * * [that] "apply to a multitude of personnel decisions that are made daily by federal agencies"; * * * [as imbued with a] "history of the development of civil service remedies and the comprehensive nature of the remedies currently available"; * * * [and as] "an elaborate remedial system that has been constructed step

> by step, with careful consideration to conflicting policy considerations"; [id at 388].

Before Mr. Lekvold filed his *Bivens* action, there had been no Congressional involvement of any significant magnitude, much less any which could be deemed "intense", "comprehensive" or even "carefully considered". Only after Mr. Lekvold filed his action did Congress adopt the 1992 amendments to the ERA.[7]

Additionally, to accept the argument that the submitted DOE activity can be the basis for a district court to defer remedy determinations to that agency is to disregard constitutional separation of powers doctrine. In *Krueger* at 1055, the 8th Circuit found: "Only Congress has the power to decide that a statutory or administrative scheme will foreclose a *Bivens* action." The court elaborated that:

> To allow an administratively-created scheme to foreclose a *Bivens* action, without some real indication that Congress intended the administratively-created scheme to have that result, would require us to hold that the legislative power to foreclose a *Bivens* action has been delegated – a delegation almost certainly in violation of the separation of powers doctrine.

See also, Tribe, *American Constitutional Law* (2d Ed. 1988), pp. 363-64, and *Mistretta v. United States*, 488 US 361, 372 (1989), reiterating that no delegation of powers from the

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[7] In a different, although analagous context, this Court has recently held that any federal statutory preclusion of a whistleblower's state law claims must be based on a clear congressional intent. *Hawaiian Airlines, Inc. v. Norris*, 114 S.Ct. 2239 (1994).

Congress to the executive or judiciary may be effective unless Congress has laid "down by legislative act an intelligible principle to which the person or body * * * is directed to conform". Nothing cited by the Ninth Circuit demonstrates that this standard has been met.

CONCLUSION

The petition for writ of certiorari should be granted, and the Ninth Circuit decision should be reversed.

Respectfully submitted,

THAD M. GUYER
Attorney for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY L. LEKVOLD Plaintiff-Appellant, v. WESTINGHOUSE HANFORD CO., a Delaware Corporation; WESTINGHOUSE ELECTRIC CORP., a Pennsylvania Corporation Defendants-Appellees.	No. 92-35271 D.C. No. CV 91-3011-FVS MEMORANDUM* (Filed May 19, 1994)

Appeal from the United States District Court
for the Eastern District of Washington
Fred Van Sickle, District Judge, Presiding

Argued and Submitted November 2, 1993
Seattle, Washington
Submission withdrawn November 4, 1993
Resubmitted May 17, 1994

Before: WRIGHT, GOODWIN, and HUG, Circuit Judges.

Gary L. Lekvold appeals a summary judgment in favor of the defense in Lekvold's damages action alleging

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

that the defendants retaliated against him for "whistleblowing" activities, in violation of his federal constitutional rights. We affirm.

At all times relevant to this appeal, Lekvold was a senior security engineer assigned to the Security Application Center at the Hanford Nuclear Reservation ("Hanford"), located in Hanford, Washington. Hanford is owned by the United States, but is managed by private contractors pursuant to a contract with the Department of Energy ("DOE"). Lekvold was hired to work at Hanford by Westinghouse Hanford Company, a subsidiary of Westinghouse Electric Corporation ("Westinghouse"), which has been the management contractor at Hanford since June 29, 1987.

Lekvold alleged that he began communicating concerns he had over the security of nuclear materials storage at the Hanford site to Westinghouse management, DOE officials, and members of Congress beginning in April 1988. He contends that Westinghouse retaliated against him as a result of these communications. Lekvold complained that Westinghouse's alleged actions violated his speech and due process rights under the First and Fourteenth Amendments.

Lekvold bases his constitutional claims on the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), which permits, under certain circumstances, damages

suits against federal officials who violate federal constitutional rights under color of federal law.[1]

The Supreme Court has allowed "*Bivens* actions" for money damages against federal offices who violate the Due Process Clause of the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1979), and the Cruel and Unusual Punishments Clause of the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14 (1980). "In each of these cases, as in *Bivens* itself, the Court found that there were no 'special factors counselling hesitation in the absence of affirmative action by Congress,' no explicit statutory prohibition against the relief sought, and no exclusive statutory alternative remedy." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) (citations omitted) (refusing to create *Bivens* remedy for persons improperly denied Social Security benefits).

Lekvold argues that a *Bivens* remedy is appropriate here because Congress has been inadvertent in not creating a legislative remedy for violation of whistleblowers' rights at DOE facilities. However, the district court concluded that Congress' repeated failure to enact proposed whistleblower legislation providing a remedy for DOE contractor employees barred a *Bivens* remedy in this case.

After the district court's decision, two major developments occurred in this area of law that are dispositive of

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[1] Lekvold claims that Westinghouse is subject to suit on a *Bivens* theory because it is a "federal actor." Westinghouse denies that it is a federal actor, but did not seek summary judgment on this issue. Thus, this issue is not before this court.

this appeal. First, Congress amended the Energy Reorganization Act of 1974 ("ERA") to provide whistleblower protection for employees at DOE-owned, contractor-operated nuclear facilities. *See* Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902(a), 106 Stat. 2776, 3123 (1992) (codified at 42 U.S.C.A. § 5851 (West Supp. 1991)). However, the amendments apply *prospectively* only to claims filed on or after the effective date of the amendments, October 24, 1992. Pub. L. No. 102-486, § 2902(i), 106 Stat. at 3125. Because Lekvold filed his action on January 25, 1991, he cannot take advantage of these amendments to recover the damages he seeks.

The second major development was the decision by another panel of this circuit in a related case that presented similar issues, *Bricker v. Rockwell Int'l Corp.*, No. 91-36153, slip op. (9th Cir. Apr. 15, 1994).[2] *Bricker* held that Congress' failure to create whistleblower protection for employees at DOE-owned, contractor-operated nuclear facilities prior to October 24, 1992 was *not inadvertent* and that a remedy for money damages should *not* be judicially created for claims filed before that time. *Id.* at 3689, 3693 (emphasis supplied).

The facts of *Bricker* are very similar to the facts here. Indeed, the district court in Lekvold's case relied on the district court decision in *Bricker*, No. CY-90-3090 AAM, 1991 WL 268026 (E.D. Wash. Sept. 17, 1991), to dispose of

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[2] Lekvold's case was withdrawn and resubmitted in order to await the outcome of a petition for rehearing and rehearing en banc filed in the *Bricker* case. The petition for rehearing in *Bricker* was denied and the suggestion for rehearing en banc was rejected on April 15, 1994. *See Bricker*, slip op. at 3685.

this case on summary judgment. We find that *Bricker* controls this case.

In *Bricker,* plaintiff Edwin Bricker was employed at Hanford Nuclear Reservation, the same nuclear facility in which Lekvold worked. In his complaint, Bricker named the two Westinghouse defendants that are also the defendants in Lekvold's complaint, as well as a third defendant, Rockwell Hanford Corporation, a division of Rockwell International Corporation, ("Rockwell"). *Bricker,* slip op. at 3685.

Bricker's complaint alleged that while he was employed at Hanford, he became aware of safety, health, and environmental problems at the facility and that he voiced his concerns about these matters to his supervisors, officials of Rockwell and Westinghouse, members of Congress, and the news media. *Id.* at 3686. As a result of these "whistleblowing" activities, Bricker contended that Rockwell and Westinghouse subjected Bricker to various forms of harassment, thereby violating his federal constitutional rights. *Id.*

Bricker argued, as Lekvold does here, that Congress' failure to provide a damages remedy for employees at DOE nuclear facilities was inadvertent and that a judicially created *Bivens* remedy was justified. *Id.* However, we have already rejected these arguments. This court in *Bricker* found that Congress, when considering the 1992 ERA amendments, "decided to provide only prospective relief even though it was aware that harassment of whistleblowers had occurred in the past at DOE nuclear facilities, including Hanford." *Id.* at 3692. For this reason, this court concluded that: "We cannot create a *Bivens* remedy

if there are indications that congressional inaction has not been inadvertent." *Id.* at 3693 (citation and internal quotation marks omitted). As the court in *Bricker,* we must defer to Congress' decision not to provide a remedy for plaintiffs such as Lekvold, whose claims arose prior to the 1992 amendments to the ERA.

Lekvold attempts to distinguish *Bricker* on several grounds. He argues that unlike in his case, Edwin Bricker had numerous administrative and statutory remedies available to him to pursue his claims. However, the district court in Lekvold's case found that Lekvold also had several avenues for processing his concerns open to him, which he used, albeit unsuccessfully. Among these was the remedy of DOE Order 5483.1A, which provides safety and health protection for DOE contractor employees, similar to those found in private industry under the Occupational Safety and Health Act. Another was the Inspector General Act of 1978, which prohibits retaliation against employees who bring complaints to the attention of the Inspector General.

Although Lekvold does not contest that these remedies exist, he argues they are *nonstatutory* remedies that do not satisfy the alternative available remedies as discussed in *Schweiker.* However, in *Bricker* we rejected an identical argument. *Bricker,* slip op. at 369-499. Additionally, we examine whether alternative remedial schemes exist to determine whether congressional inaction in an area has not been inadvertent. *See Schweiker,* 487 U.S. 412, 423 (1988). Where, as here, it is clear from the legislative history that Congress did not inadvertently fail to provide remedies for whistleblowers at DOE nuclear facilities prior to 1992, we need not examine

whether such remedial schemes existed to redress an employee's claims.

For these reasons, the decision of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

GARY L. LEKVOLD, Plaintiff, vs. WESTINGHOUSE HANFORD CO., and WESTINGHOUSE ELECTRIC CORP., Defendants.	NO. CY-91-3011-FVS ORDER RE: MOTION TO DISMISS CONSTITUTIONAL CLAIMS (Filed Feb. 25, 1992)

BEFORE THE COURT is Defendants' Motion to Dismiss Constitutional Claims for Failure to State a Claim, Ct. Rec. 13, heard with oral argument on January 17, 1992. Plaintiff was represented by Thad M. Guyer and Stephen Sirianni. Stuart Dunwoody and Robert Dutton represented the Defendants.

Jurisdiction

This Court has jurisdiction over the Plaintiff's claims arising under the First and Fifth Amendments of the Constitution of the United States pursuant to 28 U.S.C. § 1331, which provides for federal court jurisdiction for any questions "arising under the Constitution." 28 U.S.C. § 1331.

Facts

The Plaintiff, Gary Lekvold, is employed by Westinghouse Hanford Company (WHC) as a senior engineer

assigned to the Security Applications Center of the Safeguards and Security Function of the Hanford Nuclear Reservation in Hanford, Washington. Part of Gary Lekvold's job was to design and analyze security systems for the protection of on-site facilities and nuclear materials at Hanford.

In April 1988, he began dissenting from some of his supervisors' conclusions regarding the security of nuclear materials storage. In March 1989, he was removed from the work site, but continued on the WHC payroll.

Mr. Lekvold alleges that after dissenting from the Westinghouse management decisions, his credibility was attacked and disparaging reports about his mental health were entered into his personnel file. He also alleges that although his job required direct interaction with officials from the Department of Energy (DOE), he was not allowed to deal with DOE officials without a Westinghouse manager present.

Mr. Lekvold claims that his rights under the First Amendment of the United States Constitution were violated when the Defendants limited his free speech regarding criticism of the facilities, and his Fifth Amendment property rights were violated when the Defendants removed him from his work site without due process.

Discussion

The Defendants have moved, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Plaintiff's constitutional claims for failing to state a claim upon which relief can be granted. When a

moving party relies on matters outside of the pleadings when presenting a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court considers the motion as one for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). The Defendants having supplemented their motion with exhibits, the Court will consider Defendants' Motion to Dismiss as a Motion for Summary Judgment.

The purpose of a summary judgment, under Rule 56 of the Federal Rules of Civil Procedure, is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir. 1975)., *cert. denied*, 423 U.S. 1025. The moving party is entitled to judgment as a matter of law if, with the evidence and the inferences viewed in a light most favorable to the nonmoving party, there are no genuine issues of material fact in dispute. Fed. R. Civ. P. 56(c); *Semegen v. Weidner*, 780 F.2d 727 (9th Cir. 1986).

Rule 56 specifies that a defending party may move for summary judgment with or without supporting affidavits. Fed. R. Civ. P. 56 (b). A party seeking summary judgment always bears the initial burden of:

> identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file . . . which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The motion shall be granted if " . . . there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c).

In his complaint, Mr. Lekvold alleges that WHC is a "federal actor" thereby subject to suit for constitutional violations. The Defendants deny qualifying as federal actors. Determining whether or not the Defendants are "federal actors" is not necessary for the purpose of this motion, and the Court does not address the issue. Plaintiff's other factual allegations are accepted as true for the purposes of this motion. (Def.'s Mem. Supp. Mot. at 2.)

The issue before the Court is: absent any statutory cause of action, does the Plaintiff state a claim on which relief can be granted. If no such statute exists to allow Mr. Lekvold to recover on his constitutional claims, he must look to a judicially created cause of action. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

In *Bivens*, the Plaintiff sought damages from federal agents for violations of the Plaintiff's Fourth Amendment rights. *Bivens*, 403 U.S. at 390. The Court determined that, even though no statutory cause of action existed, the Plaintiff's "complaint state[d] a cause of action under the Fourth Amendment . . . [and that Plaintiff] is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment." *Bivens*, 403 U.S. at 397.

The Supreme Court of the United States created a *Bivens* type remedy for violation of Eighth Amendment rights in *Carlson v. Green*, 446 U.S. 14 (1980). However, the Court noted that a *Bivens* cause of action can be defeated in two situations:

> The first is when defendants demonstrate "special factors counselling hesitation in the absence

> of affirmative action by Congress." [Cites omitted.] The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.

Carlson v. Green, 446 U.S. 14, 18-19 (1980) (citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *Davis v. Passman*, 442 U.S. 228, 245 (1979)). The Court noted in *Carlson* that the plaintiff's complaint could support a suit under the Federal Tort Claims Act (FTCA), but that there was no indication in the legislative history of the FTCA that Congress intended the FTCA "to preempt a *Bivens* remedy or to create an equally effective remedy for constitutional violations." *Carlson v. Green*, 446 U.S. at 19. The legislative history of amendments to the FTCA indicate that Congress considered FTCA and *Bivens* to be parallel causes of action. *Id.* at 19-20.

Bush v. Lucas, 462 U.S. 367 (1982), is factually similar to the instant case. The Plaintiff was an engineer employed at a facility operated by the National Aeronautics and Space Administration. *Id.* The Plaintiff was demoted for making public comments highly critical of the center. *Id.* at 369. The Plaintiff filed a claim for violation of his First Amendment rights. *Id.* at 372.

The Plaintiff's civil service remedies created by Congress represented "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Id.* at 388. A *Bivens* remedy was not necessary, because the civil service remedies, although short of providing "complete relief"

to the Plaintiff, were available and the product of Congressional action. *Id.* The relationship between the federal government and its employees was identified as a "special factor counselling hesitation." *Bush,* 462 U.S. at 372.

Prior *Bivens* analysis was analyzed in *Bush*:

> The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation. When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps, even by the statutory remedy itself, that the courts' power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.

Bush, 462 U.S. at 378.

Other cases have identified a variety of "special factors" that warrant hesitation in the creation of a *Bivens* type remedy. The special power of Congress was identified as the "exclusive arbiter of federal fiscal affairs" as a reason not to create a judicial remedy for the government to recover damages against Standard Oil Company in *United States v. Standard Oil Co.,* 332 U.S. 301, 314-15 (1947). In *Schweiker v. Chilicky,* 487 U.S. 412 (1987), the Court declined to create a *Bivens* remedy for parties to recover damages for deprivation of social security benefits, because Congress is in a better position to determine

public interest than the judiciary. *Schweiker v. Chilicky*, 487 U.S. 412, 427 (1987).

An absence of statutory relief for constitutional violations does not imply that a judicial remedy should be created. *Id.* at 421. "[T]he concept of 'special factors counselling hesitation in the absence of affirmative action by Congress' has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Id.* at 423. *Bivens* remedies will not be created when the design of programs indicates that Congress has already provided what it would deem to be adequate remedies, whether or not the remedies offer complete relief. *Id.*

Plaintiff here argues that a *Bivens* remedy is appropriate because Congress has been inadvertent in not creating a legislative remedy for violation of whistleblowers' rights at Department of Energy (DOE) facilities. Plaintiff contends that although such legislation has been introduced, Congress has not "waded deeply" enough into consideration of enacting such legislation to avoid being characterized as "inadvertent" in its failure to enact any of the remedies.

The Defendants contend that two "special factors counselling hesitation" exist in this case: Congress has considered and rejected whistle-blower legislation for DOE contractor employees; and Plaintiff has alternative remedies available. Defendants offer an overview of proposed legislation concerning DOE contractor whistleblower remedies. (Def.'s Reply Supp. Mot. Dismiss at appendix.) They argue that Congress's failure to enact

any of these proposals does not constitution "Congressional inadvertence," but rather indicates that the legislation has not yet been presented in a form suitable for enactment.

These same arguments were addressed in a recent case in this district, *Bricker v. Rockwell Hanford Operations, et al.*, No. CY-90-3090-AAM (E.D. Wash. Sept. 17, 1991). The Plaintiff in *Bricker* was an employee of Rockwell Hanford Company, who becoming concerned about safety operations at the Hanford nuclear facility, voiced his concerns to co-employees, to members of the United States Congress, and to the news media. *Bricker v. Rockwell Hanford Operations, et al.*, Slip op. at 2-3. The Plaintiff alleged that his whistle-blowing resulted in conspiracy by the defendants to deprive him of his constitutional rights and to discredit and harass him. *Id.* at 3. Bricker sought damages for alleged violations of his First Amendment rights to free speech and association, his Fourth Amendment right be free from unreasonable searches, and his Fifth Amendment rights to due process and privacy. *Id.* at 4.

Judge McDonald reviewed the numerous attempts by Congress to pass legislation creating remedies for whistle-blowing employees of government-owned contract-operated (GOCO) facilities, such as Hanford. *Id.* at 13. The judge rejected Plaintiff's argument that a failure to enact legislation constitutes "Congressional inadvertence." *Id.* In concluding that creation of a *Bivens* remedy would be inappropriate in *Bricker*, the court noted:

> Congressional inaction that is inadvertent? Hardly. The congressional record is clear that Congress is and has been aware of the situation

> regarding "whistle-blowers" at GOCO facilities, but has failed to enact a comprehensive statutory remedial scheme. It is difficult to imagine a stronger case of what this court shall term "deliberate inaction."

Id.

Mr. Lekvold's case is factually similar to the *Bricker* case. Like Mr. Bricker, Mr. Lekvold works in a Department of Energy, government-owned contract-operated nuclear facility in Hanford, Washington. Although Mr. Bricker may have had some additional administrative remedies available to him because of the nature of his claims, the legislative history for DOE GOCO whistle-blowers is equally applicable to Mr. Lekvold as to Mr. Bricker. Also applicable to Mr. Lekvold's case is the *Bricker* Court's analysis of failed Congressional attempts to enact legislation to create remedies for whistle-blowers at DOE GOCO facilities.[1]

This Court rejects the contention that Congress's repeated consideration of remedies for whistle-blowers at GOCO facilities, and refusal to enact those remedies, equates "congressional inadvertence." Rather, it is apparent Congress has considered and rejected enacting such remedies.

The Defendants argue that a second "special factor" exists that counsels against creation of a judicial remedy:

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[1] A detailed analysis of legislation relating to whistle-blowers at contract-operated Department of Energy nuclear facilities appears in *Bricker v. Rockwell Hanford Operations et al.*, No. CY-90-3090-AAM, slip op. at 10-13 (E.D. Wash. Sept. 17, 1991).

the Plaintiff had alternative remedies available to him, which he used, albeit unsuccessfully. One of the avenues available to Mr. Lekvold was the DOE Richland Operations office "Employee Concerns Program," which investigates the complaints of DOE contractor employees. (Def.'s Mem. Supp. Mot. at 13.) Another was in the Inspector General Act of 1978, which prohibits retaliation against employees who bring complaints to the attention of the Inspector General. (*Id.* at 14.) A third remedy was through DOE Order 5483.1A, which provides safety and health protection for GOCO employees, similar to those found in private industry under the Occupational Safety and Health Act. (*Id.* at 15.) Mr. Lekvold does not contest that these remedies exist, but argues that these nonstatutory remedies do not satisfy the alternative available remedies as discussed in *Schweiker v. Chilicky.*

In *Chilicky,* the Court noted that it was inappropriate to judicially create remedies when "Congress has provided what it considers adequate remedial mechanisms for constitutional violations." *Schweiker v. Chilicky,* 487 U.S. 412, 423 (1988). As noted in *Bricker,* the "Ninth Circuit has applied the *Chilicky* expansion in a number of cases and held that where Congress has provided *some* mechanism for relief, *Bivens* claims are precluded." *Bricker v. Rockwell Hanford,* No. CY-90-3090-AAM, slip op. at 7 (E.D. Wash. Sept. 17, 1991).

The Ninth Circuit has also declined to create a *Bivens* remedy because alternative remedies existed that had been administratively, not statutorily, created. *See id.* (citing *Berry v. Hollander,* 925 F.2d 311 (9th Cir. 1991); *Saul v. United States,* 928 F.2d 829 (9th Cir. 1991); *Karamanos v. Egger,* 882 F.2d 447 (9th Cir. 1989); *Kotarski v. Cooper,* 866

F.2d 311 (9th Cir. 1989)). Because they were not statutory does not mean Mr. Lekvold's alternative remedies should be disregarded.

Congress has not been inadvertent in its failure to establish statutory remedies for whistle-blower actions in DOE facilities, but rather has consciously chosen to not enact legislation at this time. Alternative remedies existed for Mr. Lekvold. A *Bivens* remedy is not proper in this case.

Since the Plaintiff's federal claims are dismissed, the Court must decide whether to retain supplemental jurisdiction[2] over the state law claims. Although the Court may retain jurisdiction, the better practice is to dismiss the state claims without prejudice. *See Cook, Perliss & Liehe v. Northern California Collection Service Inc.*, 911 F.2d 242, 247 (9th Cir. 1990); *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985); *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 651 (9th Cir. 1984) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)).

IT IS HEREBY ORDERED: the Defendants' Motion to Dismiss Constitutional Claims for Failure to State a Claim, Ct. Rec. 13, is **GRANTED**. The complaint and claims contained therein as they relate to Plaintiff's *Bivens* claims are **DISMISSED WITH PREJUDICE**. The Plaintiff's state law claims are **DISMISSED WITHOUT PREJUDICE.**

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel. The Clerk

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[2] 28 U.S.C. § 1367(c)(3).

is also directed to close this case. All motions heretofore not ruled upon are **DENIED as MOOT.**

DATED this 21st day of February 1992.

/s/ Fred Van Sickle
FRED VAN SICKLE
United States District Judge